Yang Berhormat Menteri Sumber Manusia, Malaysia v Ornapaper Industry (M) Sdn Bhd and another appeal

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NOS W-01(IM)-611–10 OF 2011 AND W-01(IM)-2729–10 OF 2011
LOW HOP BING, ABDUL WAHAB PATAIL AND LIM YEE LAN JJCA
18 JUNE 2012

Administrative Law — Judicial review — Order of — Order of certiorari granted, appeal against — Review of Minister's decision to accord recognition to union — Whether Minister erred in exercise of his discretion so as to warrant issue of order of certiorari by High Court — Whether Minister acted in excess of his powers

The Paper and Paper Products Manufacturing Employees Union ('the union') made a claim for recognition over the employees of Ornapaper Industry (M) Sdn Bhd ('the employer'). The employer did not recognise the union on, inter alia, the grounds that supervisors, assistant supervisors and foreign workers should be excluded from the category of workmen eligible to vote for membership with the union. The Director General of Trade Unions ('DGTU') conducted a membership verification exercise that indicated that 53.57% of the employer's workmen had become members of the union as at the date when the claim for recognition was made by the union. In view of this, the Director General of Industrial Relations ('the DGIR') advised the employer to accord recognition to the union but the employer was not agreeable. The DGIR then informed the Minister of Labour ('the Minister') of the union's claim for recognition. Based on the information provided to him, the Minister made a decision granting recognition to the union. The employer applied to the High Court for a judicial review of the Minister's decision to accord recognition to the union. The High Court allowed the employer's application for judicial review and issued an order of certiorari to quash the Minister's decision in granting recognition to the union. Hence these two appeals, by the Minister and the union. The Minister submitted that he had acted on information that had been properly gathered and that there was no error of law to warrant any judicial review. The employer argued that the DGTU had failed to verify the actual job functions of the supervisors and the assistant supervisors employed by the employer and exclude them from the category of workmen eligible to vote for membership with the union.

Held, allowing both appeals with costs of RM20,000 for each appeal:

(1) It is trite law that in an application for judicial review the High Court was not entitled to consider whether the decision itself, on the merits of the facts, was fair and reasonable. It was also settled law that the power of the

court to interfere in each case was to see whether the authority when exercising its discretion had contravened the law by acting in excess of the powers conferred by Parliament (see para 15). A

(2) In the present case, the Minister's computation relating to the percentage of membership of the union was correct and in accordance with the law. It was also not in excess of the Minister's jurisdiction. As the Minister had complied with all the requirements and procedures under the law, there was no irregularity in the Minister's executive action in conducting the membership check and consequently in granting the recognition to the union. Thus, there was no basis for any intervention by the High Court and the Minister's decision to accord recognition to the union ought to be reinstated (see paras 16–17). B C

[Bahasa Malaysia summary

Kesatuan Pekerja-Pekerja Kertas dan Pembuatan Produk Kertas ('kesatuan') membuat tuntutan untuk pengiktirafan ke atas pekerja-pekerja Ornapaper Industry (M) Sdn Bhd ('majikan'). Majikan tidak mengiktiraf kesatuan tersebut atas, antara lain, alasan-alasan bahawa penyelia dan pekerja asing patut dikecualikan daripada kategori pekerja yang layak mengundi bagi keahlian dengan sekerja. Ketua Pengarah Kesatuan Sekerja ('KPKS') menjalankan pelaksanaan pengesahan keahlian yang menunjukkan bahawa 53.57% pekerja majikan menjadi ahli kesatuan pada tarikh apabila tuntutan untuk pengiktirafan dibuat oleh kesatuan. Memandangkan ini Ketua Pengarah Perhubungan Perusahan ('KPPP') menasihatkan majikan untuk memberikan pengiktirafan kepada kesatuan tetapi majikan tidak bersetuju, KPPP kemudiannya memberitahu Menteri Buruh ('Menteri') mengenai tuntutan kesatuan untuk pengiktirafan. Berdasarkan maklumat yang diperuntukkan kepada beliau, Menteri memberikan pengiktirafan kepada kesatuan. Majikan memohon kepada Mahkamah Tinggi untuk semakan kehakiman terhadap keputusan Menteri untuk memberi pengiktirafan kepada kesatuan. Mahkamah Tinggi membenarkan permohonan majikan untuk semakan kehakiman dan mengeluarkan perintah certiorari untuk membatalkan keputusan Menteri dalam memberikan pengiktirafan kepada kesatuan. Maka kedua-dua rayuan ini, oleh Menteri dan kesatuan. Menteri berhujah bahawa beliau telah bertindak atas maklumat yang telah dikumpulkan secara betul dan bahawa tidak terdapat kesilapan dari segi undang-undang untuk mewajarkan apa-apa semakan kehakiman. Majikan berhujah bahawa KPKS telah gagal untuk mengesahkan fungsi-fungsi pekerjaan sebenar penyelia-penyelia dan pembantu penyelia yang diambil bekerja oleh majikan dan mengecualikan mereka daripada kategori pekerja yang layak untuk mengundi untuk keahlian dengan kesatuan. D E F G H I

Diputuskan, membenarkan kedua-dua rayuan dengan kos RM20,000 untuk setiap rayuan:

(1) Adalah undang-undang nyata bahawa dalam permohonan untuk

semakan kehakiman Mahkamah Tinggi tidak berhak untuk mempertimbangkan sama ada keputusannya, atas merit fakta, adalah adil dan munasabah. Ia juga adalah undang-undang nyata bahawa kuasa mahkamah untuk campur tangan dalam setiap kes adalah untuk melihat sama ada pihak berkuasa apabila melaksanakan budi bicaranya telah melanggar undang-undang dengan bertindak melebihi kuasa yang diberikan oleh Parlimen (lihat perenggan 15).

(2) Dalam kes ini, perkiraan Menteri berkaitan peratusan keahlian kesatuan adalah betul dan mengikut undang-undang. Ia juga bukan melebihi bidang kuasa Menteri. Memandangkan Menteri telah mematuhi kesemua keperluan dan prosedur di bawah undang-undang, tidak terdapat ketidakaturan dalam tindakan eksekutif Menteri dalam menjalankan pemeriksaan keahlian dan seterusnya dalam memberikan pengiktirafan kepada kesatuan. Oleh itu tidak terdapat asas untuk campur tangan oleh Mahkamah Tinggi dan keputusan Menteri untuk memberikan pengiktirafan kepada kesatuan patut dikembalikan (lihat perenggan 16–17).]

Cases referred to

Associated Provincial Picture Houses Ltd v Wednesbury Corpn [1948] 1 KB 223, CA (refd)

Goon Kwee Phoy v J & P Coats (M) Bhd [1981] 2 MLJ 129, FC (refd)

Harper's Trading (M) Sdn Bhd v National Union of Commercial Workers [1991] 1 MLJ 417, SC (refd)

Holiday Villages of Malaysia Sdn Bhd v YB Menteri Sumber Manusia & Anor [2010] 7 CLJ 683, CA (refd)

Holiday Villages of Malaysia Sdn Bhd v YB Menteri Sumber Manusia and Anor [2009] 6 MLJ 402; [2008] 6 MLJ 302, HC (refd)

Hotel Equatorial (M) Sdn Bhd v National Union of Hotel, Bar & Restaurant Worker & Anor [1984] 1 MLJ 363, FC (refd)

Michael Lee Fook Wah v Minister of Human Resources Malaysia & Anor [1998] 1 MLJ 305, CA (refd)

Minister of Labour Malaysia v Lie Seng Fatt [1990] 2 MLJ 9; [1990] 1 CLJ 1103, SC (refd)

Minister of Labour and Manpower & Anor v Paterson Candy (Malaysia) Sdn Bhd [1980] 2 MLJ 122, FC (refd)

Pahang South Union Omnibus Co Bhd v The Minister of Labour and Manpower & Anor [1981] 2 MLJ 199; [1981] CLJ (Rep) 74, FC (refd)

Rex v Northumberland Compensation Appeal Tribunal ex parte Shaw [1952] 1 KB 338, CA (refd)

Syarikat Emerald Tiles Sdn Bhd v Menteri Buruh dan Tenaga Rakyat & Anor (The Non-Metallic Mineral Products Manufacturing Employees Union, intervener) [1994] 4 CLJ 906, HC (refd)

Tan Hin Jin & Anor v Prabhulal G Doshi [1971] 1 MLJ 274, FC (refd)

Legislation referred to

Industrial Relations Act 1967 s 9(2), (5)
Industrial Relations Regulations 1980 reg 4(1)(c)

Appeal from: Application for Judicial Review No R1-25-202 of 2009 (High Court, Kuala Lumpur)

Wan Suhaila (Wan Aida with her) (Senior Federal Counsel, Attorney General's Chambers) for the appellant.
Chandrasegaran (Ravindra Murugavell and Arvin Kumar with him) (Murugavell Arumugam & Co) for the appellant.
Colin Sequerah (Francis Brigged with him) (Francis Brigged & Co) for the respondent.

Low Hop Bing JCA (delivering judgment of the court):

APPEAL

[1] The two appeals before us are:

The appellant	Civil Appeal No
(1) Minister of Human Resources (the Minister)	W-01(IM)-611–10 of 2011
(2) Paper and Paper Products Manufacturing Employees Union (the union)	W-02(IM)-2729–10 of 2011

[2] The High Court had allowed the respondent's (the employer's) application for judicial review and issued an order of certiorari to quash the Minister's decision in granting recognition to the union.

[3] Hence, these appeals by the Minister and the union respectively.

FACTUAL BACKGROUND

[4] On 20 May 2004, the union made a claim for recognition over the employer's workmen (excluding the managerial, executive, confidential and security categories) pursuant to s 9(2) of the Industrial Relations Act 1967. ('the Industrial Relations Act 1967'). The claim for recognition was communicated to the employer vide letter dated 1 November 2004 from the Director General of Industrial Relations ('DGIR').

[5] The DGIR has directed the employer to fill in Form B setting out the list

of workmen, excluding those in the 'management, executive, confidential and security' categories. The union was given Form C to furnish similar particulars also.

[6] The employer did not recognise the union on the grounds, inter alia, that supervisors, assistant supervisors and foreign workers should be excluded from the category of workmen eligible to vote for membership with the union.

[7] On 6 December 2005, the DGIR wrote to the employer stating that pursuant to reg 4(1)(c) of the Industrial Relations Regulations 1980, the Director General of Trade Unions ('DGTU') had conducted a membership verification exercise. The result of the exercise indicated that 53.57% of the employer's workmen (who were within the scope of members of the union) had become members of the union as at 20 May 2004, ie the date of the claim for recognition. In view of this, the employer was advised by the DGIR to accord recognition to the union.

[8] On 23 December 2005, the employer wrote to the union with a copy to the DGIR, informing the union, inter alia, that the employer was not agreeable with the outcome of the membership verification exercise. The employer refused to recognise the union and would only accord recognition if secret ballot was undertaken for purposes of the membership check.

[9] On 27 February 2006, the DGIR informed the Minister of the union's claim for recognition.

[10] Vide letter dated 13 March 2006, the DGIR informed the employer that the Minister had made a decision dated 8 March 2006 pursuant to s 9(5), granting recognition to the union.

[11] The Minister's affidavit at pp 196–200 of the appeal record avers to the effect that:

(1) Form C submitted by the Union did not include any of the Employer's 10 Supervisors. Form C listed a total of the Union's 165 members who did not belong to the 'Management, Executive, Confidential and Security' categories.

(2) After a recount of the workmen in Form B, the actual number of workmen was 298, excluding the 10 Supervisors.

(3) By way of percentage, 165 of the 298 workmen are equal to 53.57% and hence eligible for recognition.

THE ISSUE OF CERTIORARI

[12] Learned counsel Mr Chandrasegaran (Mr Ravindra Murugavell and Mr Arvin Kumar with him) submitted for the union, and learned senior federal counsel Wan Suhaila (learned federal counsel Wan Aida with her) argued for the Minister, that the Minister had acted on information that had been properly gathered and so there is no error of law on the part of the Minister to warrant any judicial review.

[13] Employer's learned counsel Mr Colin Sequerah, (assisted by Mr Francis Brigged), responded that the positions of supervisors and assistant supervisors should be categorised as 'executive' positions and should therefore be excluded from the members eligible to vote for membership with the union, as they are involved in decision making functions in relation to recruitment, termination and/or dismissal, transfer, discipline, attending to grievances, conducting performance appraisals, awarding of increment/bonuses, assignment of duties, training, attending meeting and having access to confidential information relating to the employer's business. They stressed that the DGTU had failed to verify the job duties of the supervisors and assistant supervisors by directing his officers to interview the supervisors and assistant supervisors employed by the employer to verify the actual job functions in order to ascertain whether they fall within the 'managerial, executive, confidential and security' categories and therefore would be outside the scope of the membership of the union.

[14] The question raised in the above submissions for our consideration may be formulated as follows:

> Given the aforesaid factual background, has the Minister erred in the exercise of his discretion in his recognition decision granted in favour of the union so as to warrant the issue of the order of certiorari by the High Court?

[15] In an application for judicial review, such as the grant or refusal of an order of certiorari, we find it useful to state the fundamental principles of general application, as follows:

(a) it is trite law that judicial review is not an appeal from a decision but a review of the manner in which the decision was made and the High Court is not entitled on an application for judicial review to consider whether the decision itself, on the merits of the facts, was fair and reasonable: *Harper's Trading (M) Sdn Bhd v National Union of Commercial Workers* [1991] 1 MLJ 417 (SC) p 419 para g–l, per Jemuri Serjan SCJ (later CJ (SS); *Tan Hin Jin & Anor v Prabhulal G Doshi* [1971] 1 MLJ 274 per Azmi LP at p 275, quoting Morris LJ in *Rex v Northumberland Compensation Appeal Tribunal ex parte Shaw* [1952] 1 KB 338 at p 357; *Minister of Labour and Manpower & Anor v Paterson*

Candy (Malaysia) Sdn Bhd [1980] 2 MLJ 122 per Chang Min Tat FJ at p 125; *Hotel Equatorial (M) Sdn Bhd v National Union of Hotel, Bar & Restaurant Worker & Anor* [1984] 1 MLJ 363 per Seah FJ at p 368; *Goon Kwee Phoy v J & P Coats (M) Bhd* [1981] 2 MLJ 129 per Raja Azlan Shah CJ (Malaya) (as he then was) at p 136 paras A–C in the right hand column; *Michael Lee Fook Wah v Minister of Human Resources Malaysia & Anor* [1998] 1 MLJ 305 at p 309 para d–e per Shaik Daud JCA; and

(b) the courts can only interfere with an act of executive authority if it be shown that the authority has contravened the law. The court is not a court of appeal in such matters. The exercise of such discretion is governed by certain principles and so long as the exercise is within the four corners of these principles, the discretion is absolute and cannot be questioned in a court of law. The exercise of the discretion must be a real exercise in the sense that the authority exercising the discretion must consider matters required to be considered and disregard irrelevant collateral matters. If the authority fails to observe these principles, the exercise of discretion cannot be said to be 'reasonable'. The power of the court to interfere in each case is to see whether the authority exercising the discretion has contravened the law by acting in excess of the powers conferred by Parliament: *Minister of Labour, Malaysia v Lie Seng Fatt* [1990] 2 MLJ 9 (SC) at p 11 para i, per Hashim Yeop A Sani CJ (Malaya), referring to the dictum of Lord Greene MR in the celebrated case of *Associated Provincial Picture Houses Ltd v Wednesbury Corpn* [1948] 1 KB 223.
(See also *Holiday Villages of Malaysia Sdn Bhd v YB Menteri Sumber Manusia and Anor* [2009] 6 MLJ 402; [2008] 6 MLJ 302 (HC), affirmed in *Holiday Villages of Malaysia Sdn Bhd v YB Menteri Sumber Manusia & Anor* [2010] 7 CLJ 683 (CA); *Pahang South Union Omnibus Co Bhd v The Minister of Labour & Manpower & Anor* [1981] 2 MLJ 199; [1981] CLJ (Rep) 74, p 203 (MLJ), p 78(CLJ) (FC); and *Minister of Labour Malaysia v Lie Seng Fatt* [1990] 2 MLJ 9; [1990] 1 CLJ 1103 (SC).

[16] Reverting to the above factual background, the Minister's computation relating to the percentage of membership of the union is correct, and in accordance with the law. It is also not in excess of the Minister's jurisdiction. As the Minister has complied with all the requirements and procedures under the law, there is no irregularity in the Minister's executive action in conducting the membership check and consequently granting the recognition to the union. There is no basis for any intervention by the High Court: *Syarikat Emerald Tiles Sdn Bhd v Menteri Buruh dan Tenaga Rakyat & Anor (The Non-Metallic Mineral Products Manufacturing Employees Union, intervener)* [1994] 4 CLJ 906 (HC).

CONCLUSION

[17] On the foregoing grounds, we answer the aforesaid question in the

negative. Hence, the High Court should not have allowed the employer's application for judicial review by way of an order of certiorari to quash the Minister's decision in granting recognition to the union. We therefore allow these two appeals; set aside the order of the High Court and substitute it with an order that the recognition of the union accorded by the Minister be reinstated, with costs of RM20,000 here and in the court below, for each appeal.

[18] Deposit to be refunded to the union.

Both appeals allowed with costs of RM20,000 for each appeal.

Reported by Kohila Nesan